

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

DAVID SELL, 97-B-2642
Petitioner

v

JAMES T. CONWAY,
Respondent

**NOTICE OF MOTION OPPOSING
TRANSFER OF HABEAS CORPUS
PETITION**

10-CV-6182L

PLEASE TAKE NOTICE that Respondent, JAMES T. CONWAY, Superintendent of Attica Correctional Facility, by his attorney, FRANK A. SEDITA, III, the District Attorney of Erie County, State of New York, MICHAEL J. HILLERY, Assistant District Attorney, of counsel, moves pursuant to 28 U.S.C. § 636(c)(1) to oppose the transfer of the habeas corpus petition from United States Magistrate Judge Marian W. Payson to United States Magistrate Judge Victor E. Bianchini.

This motion is based upon the annexed affidavit of MICHAEL J. HILLERY, ESQ.

This motion will be submitted to the Court at a date and time to be set by the Court at the U.S. Courthouse, 68 Court Street, Buffalo, New York. Oral argument is not requested.

DATED: Buffalo, New York
June 23, 2011

FRANK A. SEDITA, III
DISTRICT ATTORNEY
ERIE COUNTY

By: s/Michael J. Hillery
MICHAEL J. HILLERY
Assistant District Attorney
Erie County District
Attorney's Office
25 Delaware Avenue
Buffalo, New York 14202
(716) 858-2448
michael.hillery@erie.gov

TO: David Sell

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

DAVID SELL, 97-B-2642
Petitioner

v

JAMES T. CONWAY,
Respondent

**AFFIDAVIT IN SUPPORT OF
MOTION OPPOSING TRANSFER
OF HABEAS CORPUS PETITION**

10-CV-6182L

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

MICHAEL J. HILLERY, being duly sworn, deposes and says:

1. I am an Assistant District Attorney, of counsel to FRANK A. SEDITA, III, the District Attorney of Erie County, attorney for Respondent, JAMES T. CONWAY, Superintendent of Attica Correctional Facility.

2. This affidavit is made in support of respondent's Motion Opposing Transfer of Habeas Corpus Petition, which is brought pursuant to 28 U.S.C. § 636(c)(1).

3. By letter received by the Erie County District Attorney's Office on or about July 9, 2010, this Court advised that the parties may consent to proceed to disposition of this case before Magistrate Judge Marian W. Payson pursuant to 28 U.S.C. § 636(c). A copy of this letter is attached as Exhibit A.

4. With that understanding, attorney for respondent signed the enclosed consent form, agreeing to the specific provisions set forth in the accompanying letter, namely, that

Magistrate Judge Marian W. Payson would handle all aspects of the case. A copy of the signed consent form is attached as Exhibit B.

5. Subsequently, without notice to or request for consent from the parties, this Court ordered that the habeas corpus petition be transferred to United States Magistrate Judge Victor E. Bianchini for all further proceedings consistent with the scope of the original referral order. A copy of this order, dated May 4, 2011, is attached as Exhibit C.

6. Respondent opposes this transfer on grounds that it violates the terms of the consent as understood by respondent based upon the explicit indication that Magistrate Judge Payson would handle all aspects of the case to disposition. See *Hester v Graham, et al.*, 289 Fed. Appx. 35, 2008 WL 2958984 (C.A.5 (Tex.)).

7. Respondent has neither explicitly nor implicitly consented to the transfer of the habeas corpus petition, having not appeared before Magistrate Judge Bianchini without objection. See *Astra USA, Inc. v. Bildman, et al.* 375 Fed. Appx. 129, 2010 WL 1731815 (C.A.2 (Vt.)).

WHEREFORE, Respondent respectfully requests that this Court rescind its order of May 4, 2011 transferring the habeas corpus petition to United States Magistrate Judge Bianchini.

s/Michael J. Hillery
MICHAEL J. HILLERY
Assistant District Attorney
Erie County District
Attorney's Office
25 Delaware Avenue
Buffalo, New York 14202
(716) 858-2448
michael.hillery@erie.gov

Subscribed and sworn to before me
this day of June, 2011.

s/Donna A. Milling
DONNA A. MILLING
Notary Public, State of New York
Qualified in Erie County
My Commission Expires February 9, 2012.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

DAVID SELL,

Petitioner

AFFIDAVIT
OF SERVICE

v

10-CV-6182

JAMES T. CONWAY,

Respondent

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

RITA A. PLATT, being duly sworn, deposes and says:

That she is over the age of twenty-one (21) years and is employed by the County of Erie at the Erie County District Attorney's Office; that on June 23, 2011, she served the within Notice of Motion Opposing Transfer of Habeas Corpus Petition upon David Sell, petitioner, addressed to David Sell, 97-B-2642 at his last known address, C/O Attica Correctional Facility, P.O. Box 149, Attica, New York 14011, by depositing a true copy of same, securely enclosed in a postpaid wrapper, in a post office box regularly maintained by the United States Postal Service at the Erie County Hall in the City of Buffalo, New York in the above-captioned matter.

s/Rita A. Platt
RITA A. PLATT

Subscribed and sworn to before
me on June 23, 2011.

s/Donna A. Milling_____
DONNA A. MILLING
Notary Public, State of New York
Qualified in Erie County
My Commission Expires February 9, 2012.